S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

BROWNWYN J. STANZLER, Plaintiff-Appellee,	UNPUBLISHED October 18, 2007
v	No. 273884 Wayne Circuit Court Family Division
ROBERT A. STANZLER, Defendant-Appellant.	LC No. 04-408695-DM

Before: Kelly, P.J., and Meter and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order granting plaintiff's motion to change the legal residence and domicile of their minor child from Michigan to London, England. We remand for further proceedings.

The parties married in 1995 and their son, Taran, was born two years later. The trial court entered a consent judgment of divorce on April 15, 2005. The parties were granted joint legal custody, with plaintiff having sole physical custody. Defendant was given extensive parenting time.

Plaintiff remarried. She continued to live in the marital home with Taran, her new husband, and plaintiff's other minor child from a prior relationship.

On September 8, 2006, plaintiff filed an emergency motion seeking "Change of Custody and Residence of the Minor Child." She alleged that she and her new husband were unable to find work in Michigan, and that both had been offered employment in London. Plaintiff's motion further alleged that she and her new husband were Taran's primary caregivers, and that defendant had not provided a suitable environment or living arrangements for Taran during his allotted parenting time. Defendant filed a motion seeking an injunction prohibiting a domicile or residence change and an order placing the child's passport into escrow. He did not seek physical custody of his son.

The trial court conducted an evidentiary hearing. Plaintiff testified that she and her new husband had filed for joint bankruptcy. She stated that their Grosse Pointe Park home was in foreclosure and eviction imminent. Plaintiff described the unsuccessful efforts that she and her husband had made to find employment in Michigan, the jobs that they had been offered in

London, and the living arrangements that were available to the family there. According to plaintiff, the British school that Taran would attend had breaks every six weeks. She proposed that defendant's parenting time occur during those breaks, either in London or the United States, and that the parties share the cost of the airfare.

Defendant testified that he saw his son regularly according to the parenting time schedule, volunteered in his son's classroom, and vacationed with him every summer. Additionally, defendant explained that he actively practiced Judaism, observed religious holidays with Taran, and would not be able to do so on a consistent basis if plaintiff and Taran moved to London. According to defendant, the judgment of divorce provided him with approximately 145 days with Taran per year, while plaintiff's proposed parenting time plan would permit fewer than thirty five days, taking travel time into account.

The trial court granted plaintiff's motion for change of residence after reviewing the factors set forth in MCL 722.31, also known as the *D'Onofrio* factors. *D'Onofrio v D'Onofrio*, 144 NJ Super 200, 206-207; 365 A2d 27 (1976), aff'd 144 NJ Super 352; 365 A2d 716 (1976). The court made no determination as to whether there was an established custodial relationship with defendant and did not address the best interests of the child.

Defendant's principal argument on appeal is that the trial court erred in failing to determine whether an established custodial environment existed and in failing to analyze the best interest of the child factors provided in MCL 722.23. Defendant's claim that the trial court's legal analysis was flawed presents a question of law to which we apply a de novo standard of review. *Hoste v Shanty Creek Mgt, Inc.*, 459 Mich 561, 569 n 7; 592 NW2d 360 (1999). Issues of statutory interpretation also involve questions of law subject to de novo review. *Eggelston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

Although we conclude that the trial court properly considered the factors set forth in MCL 722.31 under a preponderance of the evidence standard, we agree that the court's analysis was incomplete and remand for the trial court to make a determination whether the modified custody arrangement amounts to a change in the established custodial environment, as set forth in MCL 722.27. If the court finds that "the relocation would result in a change in parenting time so great as to necessarily change the established custodial environment[,]" then the court must conduct an inquiry into the best interest factors set forth in MCL 722.23. *Brown v Loveman*, 260 Mich App 576, 594-595, 598 n 7, 680 NW2d 432 (2004). At that hearing, plaintiff must prove by clear and convincing evidence that the move to London would serve the child's best interests. MCL 722.27(1)(c).

Where, as here, a parent petitions the court to change the legal residence of the child "to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the [custody] order is issued," the court must consider the following factors, set forth in MCL 722.31(4), before permitting the change:

> (a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.
>
> (b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and

whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.

(c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.

(d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.

(e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

In this case, the trial court considered the MCL 722.31 factors and noted that the first factor was the most important to its decision. It found that the improvement in the quality of life for plaintiff and the child if they were allowed to move would be "fantastic" because of the ability of plaintiff and her new husband to be employed in the United Kingdom. The court also briefly addressed the other factors. The court found that the relationship between Taran and his father could be "preserved and fostered" through a combination of regular visits and "virtual visits" utilizing internet technology. The court did not err in analyzing the MCL 722.31(4) factors under a preponderance of the evidence standard. *Brown*, *supra* at 582-583. Further, the court's factual findings did not contravene the great weight of the evidence, and it did not abuse its discretion by granting plaintiff's request for a change of domicile. *Id.* at 600-601.

The court did err, however, in concluding its analysis at that point. As this Court noted in *Brown*, *supra* at 590-591:

> Because it is possible to have a domicile change that is more than one hundred miles away from the original residence without having a change in the established custodial environment, the trial court did not err in solely applying the *D'Onofrio* factors to the change of domicile issue. However, once the trial court granted defendant permission to remove the minor child from the state, and it became clear that defendant's proposed parenting time schedule would effectively result in a change in the child's established custodial environment with both parties, it should have engaged in an analysis of the best interest factors, MCL 722.23, to determine whether [the moving party] could prove, by clear and convincing evidence, that the removal and consequent change in established custodial environment and parenting time was in the child's best interest.

Thus, if the move constituted a change in the established custodial environment, the trial court was required to consider whether clear and convincing evidence demonstrated that it was in the best interests of the child under MCL 722.23.

Accordingly, the trial court should have determined whether an established custodial environment existed between Taran and defendant. A custodial environment is established if "over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). An established custodial environment can exist with both parents, even if the child's primary residence is with one parent and the same parent provides most of the financial support for the child. *Jack v Jack*, 239 Mich App 668, 671; 610 NW2d 231 (2000). Whether an established custodial environment exists is a question of fact. *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001).

If the trial court determines that the existing record permits a determination regarding the existence of an established custodial environment with respect to defendant, it may make a decision based on the record. If the record is insufficient, the trial court must hold an evidentiary hearing. If the trial court determines that there was an existing custodial environment involving defendant, plaintiff must prove by clear and convincing evidence that a change of Taran's domicile to London is in his best interests, applying the factors provided in MCL 722.23.

Defendant also raises three additional arguments on appeal. Defendant failed to raise any of these issues before the trial court. This Court reviews defendant's unpreserved claims for plain error. *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004).

First, defendant argues that the trial court erred in failing to order or consider a court-ordered psychological evaluation prior to the hearing. He claims an evaluation was required by the judgment of divorce before any party could properly bring a motion before the trial court. This argument fails because the judgment of divorce contains no reference to a psychological evaluation.

Second, defendant correctly points out that the judgment of divorce requires that disputes over parenting time be submitted to a parenting time facilitator before a motion may be filed. In general, a trial court's decisions whether a court order has been violated and what actions to take as a result are reviewed for an abuse of discretion. *Zantop Int'l Airlines, Inc v Eastern Airlines*, 200 Mich App 344, 359; 503 NW2d 915 (1993) (reviewing for abuse of discretion the trial court's decision to dismiss an action for violation of the court's order in limine). The consent judgment of divorce provides that "Ross A. Beckley, Ph.D., shall continue as parenting time coordinator/facilitator until further order of the Court. Any issues either party may have as to parenting time must be presented to Dr. Beckley for facilitation and resolution prior to either party filing a motion with this court."

Plaintiff testified that she scheduled an appointment with Dr. Beckley, but defendant cancelled it two hours prior to the appointment and neither party rescheduled it. The issue was not addressed in defendant's testimony at the hearing. Therefore, the record contains at least some support for a finding that plaintiff attempted to resolve the issue through a meeting with Dr. Beckley, which is all that the judgment of divorce requires. More importantly, defendant did not argue before the trial court that plaintiff's motion was inappropriate for this reason. In fact, it seems unlikely that this dispute could have been resolved through Dr. Beckley, especially given defendant's testimony that his confidence in Dr. Beckley had "diminished considerably." Consequently, we detect no plain error arising from this unpreserved issue.

Third, defendant argues that the trial court was required to obtain a friend of the court investigation and recommendation concerning the change in custodial environment. Defendant cites no legal authority for the proposition that the trial court was required to order a friend of the court investigation and the judgment of divorce contains no such requirement. In addition, while the trial court may consider a friend of the court report and recommendation to understand the context of the dispute and the issues to be resolved, the report and recommendation are not admissible as evidence unless both parties agree to their admission. *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989). A trial court need not consider a friend of the court report in deciding a custody dispute. *Id*. Therefore, the trial court's failure to order or utilize a friend of the court report or recommendation did not constitute plain error.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher